No. 89-857

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

W.B. SAUNDERS COMPANY and CBS EDUCATIONAL AND PROFESSIONAL PUBLISHING, a Division of CBS Inc.,

Petitioners,

v.

ADELINE M. BRUNO,

Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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I.

INTRODUCTION

This reply addresses only arguments made in respondent's brief in opposition to the petition for certiorari concerning question I of that petition. After a review of respondent's arguments in respect of questions II and III of the petition, petitioners have concluded that a reply to those arguments is unnecessary.

II.

THE RECORD IN THIS CASE AND THE OPINION OF THE COURT BELOW SQUARELY PRESENT QUESTION I OF THE CERTIORARI PETITION FOR RESOLUTION BY THIS COURT

Unassailably, the opinion of the court below declares the law of the Third Circuit to be that whenever an employer prefers a person younger than 40 over a person who is 40 or over, an inference of age discrimination is permissible. The opinion of the court below on this issue is unequivocal:

> This case presents the more common type of discrimination case where the plaintiff is within the protected class and the person ultimately chosen for the job is not. In title VII cases of race or sex discrimination, from which our method of analyzing age discrimination claims has been transplanted, this would be enough to support an inference of discrimination. (citations omitted). *So it is in actions under the ADEA. Maxfield* did not disturb the settled rule that *more favorable treatment for those not within the protected class will support an inference of age discrimination.*[1] (A-9)[2] (emphasis supplied).

The opinion of the court below similarly does not equivocate when it declares that a plaintiff who has satisifed this *de minimis* burden can sustain an ADEA verdict merely by pointing to evidence unrelated to age which attacks the credibility of the employer's explanation. (A-11) ("If a 'legitimate, non-discriminatory' reason articulated by a defendant faced with a *prima facie* case of discrimination is not

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[1] In a BNA Special Report published two days before the petition for certiorari was filed in this case, the authors of that report concluded that the holding of the court below in this case "limited the sufficient-age-difference rule of *Maxfield* to the situation in which the plaintiff and the successful job applicant are both in the protected-age class." S. Rappoport, *Age Discrimination: A Legal And Practical Guide For Employers* 241 (BNA 1989) (hereinafter referred to as "BNA Special Report").

[2] References to pages of the appendix to the certiorari petition shall be designated as: "(A-____)." References to the joint appendix filed with the court below shall be designated as: "(Joint Appendix at ____)."

the true reason for a failure to hire, the court may infer that the actual reason was impermissible."). In this regard, the court sustained Bruno's verdict solely upon evidence which, in its view, tended to discredit Degutis' explanation that he perceived Bruno's attitude to be half-hearted and that Dietrich proved herself to be fully qualified for the Clinics job. (A-10 through A-11). By so holding, the court below necessarily concluded that evidence which merely attacks the soundness of an employer's business judgment will support a finding of age discrimination.

Bruno's principal contention respecting question I of the petition is that this case does not present that question because her proof included "ample direct evidence of age bias, as well as . . . a variety of circumstantial, anecdotal and statistical proofs." Respondent's Brief in Opposition at 2. Bruno's contention is without merit. As the examples provided in the note below demonstrate, Bruno has flagrantly and repeatedly misrepresented the record.[3] These unsupported

[3] Bruno's Brief in Opposition reports that "Degutis waited until Bruno was on vacation before posting the job, and then complained at trial of her late application [91]." *Id.* at 7. In fact, the job was posted on December 17, 1984, *Id.* at 7, and Bruno testified that she did not go on vacation until the week following New Year's Day. (Joint Appendix at 125-6).

Bruno's Brief in Opposition reports that Degutis "repeatedly perjured himself on the stand." In particular, Bruno reports that "Degutis first testifed that he *went into* the Clinic department to observe Dietrich 'daily if not every other day' [115]", (emphasis added), but later "confessed that he only went into the Clinics department 'once or twice in the entire time of that interview process' [115-6]." *Id.* at 11 n. 12 and 13. In fact, Degutis testified on direct examination that "[he] simply didn't have the time to go into that department and run it [himself]" but that he met with Dietrich "if not daily, at least every other day through that time period." (Joint Appendix at 100-102). On cross-examination, Degutis' testimony was the same. (Joint Appendix at 115).

Bruno's Brief in Opposition reports that William Wright, who played no role in the challenged decision, stated to Bruno that he too "would have pursued an age discrimination claim," *Id.* at 15, when in fact the statement which Bruno attributed to Wright was: "Off the record, Addie, if I were you, I think I'd've done the same thing, . . . but if you ever repeat that I'll deny it." (Joint Apendix at 635.)

Finally, Bruno's Brief in Opposition reports that Dietrich placed Bud Henry on probation upon learning that he might testify for Bruno and that

(footnote continues on next page)

contentions all were made below, were addressed by petitioners in the court below, and properly were rejected by that court in making its determination as to whether the record is sufficient to sustain the jury's verdict of age discrimination. Those contentions cannot change the immutable language of the opinion below, which is unambiguous in its description of Bruno's evidence of age discrimination.

Clearly, the court below sustained Bruno's verdict solely upon her undisputed proof that she was within the class protected by the ADEA and that the successful applicant (Dietrich) was not, and upon evidence unrelated to age which, in the eyes of the court below, tended to undermine the soundness and fairness of Saunders' selection of Dietrich for that job. (A-7 through A-11). Indeed, despite Bruno's contention that she proved her case with "ample direct evidence of age bias," the thrust of her argument to this Court on the evidence *of record* is that her qualifications for the Clinics job were so far superior to Dietrich's that a legitimate business reason could not have motivated the selection of Dietrich. Respondent's Brief in Opposition at 4-5, 6-7, and 10-11.

In light of the unambiguous language of the opinion below, it is unassailable that the record in this case and the decision of the court below on that record raise the issue set forth in question I of the petition for certiorari, which issue is identical to the issue on which this Court granted certiorari in *Harbison-Walker Refractories, Inc. v. Brieck*, 822 F.2d 52 (3d Cir. 1986), *cert. dismissed*, 109 S. Ct. 546 (1988). This issue is of critical importance to the proper administration

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(footnote continued from previous page)

she extended Henry's probation when the trial was continued. *Id.* at 6 n. 7. In fact, Henry testified that on July 31, 1986, Dietrich placed him on written warning for poor performance, and that on November 6, 1986, Dietrich extended that warning to April, 1987. (Joint Appendix at 756-9.) Henry testified that in April, 1987, Dietrich told him that "she had no difficulty with [him] . . . up until three weeks ago when she first learned that [Henry] was going to testify to her incompetence." (Joint Appendix at 757.) Thus, according to Henry's own testimony, Dietrich placed Henry on probation more than eight months *before* she learned that he would testify and extended that probation more than five months *before* Judge Ditter's April, 1987 decision to continue the May 4, 1987, trial date.

of the ADEA and effectuation of congressional intent. It has become a preeminent concern to employers whenever their employment decision-making involves a member of the class protected by the ADEA. Certainly employers who must litigate ADEA claims in the Third Circuit are justified in their concern, given that the holding of the court below unquestionably converts the trial of such claims into a trial of the employer's business judgment. *See, Bienkowski v American Airlines, Inc.*, 851 F.2d 1503, 1508 n.6 (5th Cir. 1988).

The decision of the court below adds significantly to the confusion, conflict, and disarray of the lower federal courts concerning this fundamental question of federal law. To be sure, the BNA Special Report referred to previously focuses upon the disturbing conflict which exists among the circuits respecting this issue by noting:

> The ability of employees to assert their rights under the [ADEA] may depend on where they live. That disconcerting fact has resulted because the American court system has taken a statute written for nationwide applicability and interpreted it on a regional basis. The law of age discrimination in Philadelphia is not necessarily the law in Chicago, and the law in those two places may differ from that in Atlanta.[4]

BNA Special Report, p. 3.

Bruno's brief in opposition to the petition is conspicuously silent respecting the existence of this conflict.

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[4] In announcing the publication of the Special Report, BNA noted: "Even the basic question of how a prima facie case of age discrimination is defined has resulted in sharp disagreements among the circuits, according to the analysis . . . ." BNA Daily Labor Report, No. 226, November 27, 1989, at A-6.

III.

CONCLUSION

By reading "age" out of the ADEA, the decision of the court below frustrates the intent of that statute. This Court must correct that substantial error and put an end to the discord which exists among the lower federal courts on this issue. The record in this case and the opinion of the court below squarely and honestly present this Court with the opportunity to do so.

Respectfully submitted,

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